United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

ORIGINAL

No. 74-2343

United States Court of Appeals
For the Second Circuit

GER-RO-MAR, INC., a corporation, d/b/a SYMBRA'ETTE, now known as SYMBRA'ETTE, INC., and CARL G. SIMONSEN, individually and as President of GER-RO-MAR, INC., now known as SYMBRA'ETTE, INC.,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for Review of Order of Federal Trade Commission

REPLY BRIEF FOR PETITIONERS

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ARGUMENTS

A. THERE IS NO SUBSTANTIAL EVIDENCE OF PROBATIVE VALUE TO SUPPORT A FINDING THAT SYMBRA'ETTE'S MARKETING PLAN HAS A SUBSTANTIAL CAPACITY AND POTENTIAL TO MISLEAD OR TO DECEIVE.

It is the contention of the Commission that the substantial evidence rule is satisfied if there is of record such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. (Brief For Respondent, page 25.)

Petitioners urge that substantial evidence must be more than a scintilla of evidence and must do more than create a suspicion of the existence of a fact to be established. It

must afford a substantial basis from which the fact in issue must be reasonably inferred. (*J. B. Lippincott Co. v. FTC* (3rd Cir. 1943) 137 F.2d 490.) Vague, uncertain and irrelevant matter are excluded. Substantial evidence implies a quality and character of proof which induces conviction and makes a lasting impression on reason. It must have rational probative force. (*Carlay Co. v. FTC* (7th Cir. 1946) 153 F.2d 493; and *Antitrust Law and Trade Regulations*, Von Kolinowski, Volume 12, §88.08[3], page 88-70, footnote 19.) Additionally, a finding supported by evidence contrary to actual experience is not supported by substantial evidence. (*Gelb v. FTC* (2nd Cir. 1944) 144 F.2d 580.)

With the foregoing standards in mind, it is submitted that there is no substantial evidence of probative value of record to support a finding that the Symbra'Ette marketing plan has a substantial capacity and potential to mislead and to deceive.

The Commission makes the following contentions:

1. The deception inherent in the Symbra'Ette marketing plan is its promise of large financial rewards which are impossible to achieve (Brief For Respondent, page 26);

2. The inherent deceptiveness of Petitioners' marketing plan lies in its promise of an objective which is mathematically impossible to achieve. (Brief For Respondent, page 34.)

It appears that both contentions are premised on the theoretical, mathematically derived saturation theory to show the alleged inability or impossibility of having fu-

ture participants for the more recent distributors. (Brief For Respondent, page 34.) The Commission developed a theoretical saturation theory which is predicated on a geometrical progression of recruits. The Commission then draws from the theoretical mathematical analysis an exhaustion of the number of available participants. (Brief For Respondent, pages 34 and 35.)

In truth and in fact, the number of active Symbra'Ette distributors varied between 633 and 3,635 over the period of December 4, 1967 and March 12, 1972. The peak number (3,635) occurred about March 12, 1972. The minimum number (633) of Symbra'Ette distributors for this period occurred about December 19, 1967. Between May 22, 1969 and June 12, 1969, the number of Symbra'Ette distributors fell from 2,323 to 1,343. (RX-14 through RX-71.) Symbra-'Ette began its direct selling program in 1963 and over a period of ten years, the number of Symbra'Ette distributors at the peak period of March 12, 1972, was 3,635. At no time did the number of active distributors exceed 4,000. Considering the fact that the population of the United States is in excess of 200,000,000 people, the concept of saturation of participants or the inability of later participants to find available distributors is a fantasy and an absurdity.

The Commission urges that by virtue of the theoretical saturation theory, the opportunity of a later recruit to to find an actually available participant is substantially less than that afforded to an earlier participant. Yet, the Commission reasons, such later participant is still required to incur the same costs in terms of money, time, labor and energy as are exacted from the earlier recruit,

whose chances for success were greater. (Brief For Respondent, pages 35 and 36.)

Can one seriously contend, in view of the actual facts of record, that there is a possibility of exhaustion of participants, or that later recruits will be subjected to undue competition or hardships because of a saturation of available participants in the United States? The Commission's comment at footnote 9 of page 35 of the Brief For Respondent is incorrect as to the testimony of Dr. Wassenaar. Dr. Wassenaar never testified that 3,000 distributors was probably the saturation point for Symbra'Ette. No such inference can be drawn from a logical and realistic perusal of the Transcript between pages 273-276. A printing error appears in the Brief For Petitioners on page 22, line 27. The word "now" should be . . . not . . . .

The remote possibility or fanciful theory of private injury is not enough to authorize the Commission to issue an order to cease and desist from a business which cannot reasonably be said to constitute an unfair method of competition. (*Arnold Stone Co. v. FTC* (5th Cir. 1931) 49 F.2d 1017.)

The issue under consideration is not a question of weighing the evidence to determine the way it preponderates. It is not a question of selecting one of two inconsistent conclusions. On the contrary, it is a question of whether the theoretical, mathematically derived saturation theory relied upon by the Commission affords a substantial basis from which the fact in issue can reasonably be inferred. The character of the evidence is lacking in this regard. The quality and character of the

proof does not induce a conviction or make a lasting impression on reason. It does not have rational probative force. A theoretical analysis contrary to actual experience is not substantial evidence. (*Gelb v. FTC,* supra.)

The Petitioners feel compelled to stress the fact that the rule of substantial evidence is one of fundamental importance and marks the dividing line between law and arbitrary power. Since the Commission performs the roles of complainant, prosecutor, judge and jury, it is only the process of judicial review that assures the maintenance of fairness and evenhandedness.

B. PARAGRAPHS 1 AND 2 OF THE ORDER DO NOT BEAR ANY RELATION TO THE FACTS OF THIS CASE AND GO BEYOND WHAT IS REASONABLY NECESSARY TO CORRECT THE ALLEGED WRONG AND TO PRESERVE THE RIGHTS OF THE PUBLIC.

Petitioners contend that an order should go no further than is reasonably necessary to correct the alleged wrong and preserve the rights of the public. When measures employed achieve the results desired by the Commission, there is no need to employ more drastic means. (*FTC v. Royal Milling Co.* (1933) 288 U.S. 212; *Swanee Paper Co. v. FTC* (2nd Cir. 1961) 291 F.2d 833; *Korber Hats, Inc. v. FTC* (1st Cir. 1962) 311 F.2d 358.) It appears that the Commission concedes that an order should not be unduly broad or go beyond what is necessary to achieve the results desired. (Brief For Respondent, page 62.) However, the Commission states the following on page 62 of the Brief For Respondent:

> Paragraphs 1 and 2 of the Commission's order in the present matter, however, are not unduly broad and go only so far as is necessary *to eliminate the open-ended recruiting from petitioners' marketing program.* (Italics added for emphasis.)

The Commission in its Opinion on page 14 makes clear that it does not intend to eliminate the open-ended, multi-level marketing program, but, rather, eliminate the alleged abuses thereof. Specifically, the Commission stated in its Opinion:

> We have endeavored in drafting our order to prevent respondents from inducing individuals to distribute respondents' products on the basis of false premises, while leaving respondents flexibility to offer individuals a legitimate business opportunity in a non-deceptive manner. . . . (Opinion, page 14.)
>
> . . . We believe that paragraph 2 will prevent abuses of the recruitment lure, and achieve the requisite fencing in, while leaving respondents appropriate latitude to develop a participant generated vertical distribution network in a nondeceptive manner. (Opinion, page 17.)

Paragraph 1 of the Order is not practical from a business point of view. Firstly, there is no way to police a marketing program so as to ascertain when, in fact, sales have been made to ultimate consumers. Neither a reporting system nor the employment of field representatives will be able to ascertain such information with any degree of accuracy. Additionally, the incentive of immediate sales to new distributors has been dampened. The program will become sluggish and participants will lose enthusiasm.

Such an attitude does not lend itself to a successful marketing program. It will defeat the ability to carry on an open-ended, multi-level selling program.

Paragraph 2 of the Order creates the problem of discrimination among third tier participants. It arbitrarily discriminates between new and old third tier participants, to-wit: those third tier participants that have been with the program a year or more and those third tier participants that have been with the program less than a year. This discrimination will not serve to improve the mental attitude and the morale of new participants. It is a blatant discriminatory practice that does not lend itself to rationalization by the new third tier participant. It is difficult for one to understand why she has to wait one year to enjoy the complete benefits of a marketing program. As a consequence thereof, the Symbra'Ette program will not have new participants and will lack acceptability to those resenting discirminatory treatment.

The Commission's rationale in the present action is that Symbra'Ette in its advertising has made misrepresentations as to the availability of new participants and the promise of reward. The structured argument in the Brief For Respondent throughout the Brief, and particularly commencing on page 23 and continuing through page 38, is that the Commission seeks to prevent false advertising. On page 26 of the Brief For Respondent, the Commission contends the deception in the Symbra'Ette marketing plan is the *promise* of *large* financial awards which are impossible to achieve. Incidentally, there is no evidence of record to show such representations to be false. Again, the Commission speculates and surmises that such repre-

sentations must be false. It would appear from the Commission's Opinion and the Brief For Respondents that, if Symbra'Ette were prohibited from making the allegedly false representations, the alleged wrong will have been corrected.

On page 14 of its Opinion, the Commission stated misrepresentations of potential earnings is a particularly grave abuse and must be strictly curbed. We believe, the Commission continues, that Paragraphs 4 and 5 of the Order are suited for this purpose (Opinion on page 14). The Commission further states on page 15 of its Opinion that Paragraph 8 of the Order prohibits the representations that the supply of potential participants in respondent's program is virtually inexhaustible. Paragraph 7 of the Order requires that a prospective participant be informed in writing of other participants in the marketing area in which the prospective participant plans to operate.

It is manifest from the foregoing that Paragraphs 1 and 2 of the Commission's Order go beyond what is necessary to correct the alleged wrong of alleged misrepresentations in advertising and to preserve the rights of the public. The ultimate result of Paragraphs 1 and 2 of the Order for reasons heretofore advanced is the destruction of the Petitioner corporation and the elimination of the Symbra'Ette marketing program. On the other hand, an order prohibiting any alleged misrepresentations in advertising should suffice for correcting the alleged wrong and protecting the rights of the public. An order should not go beyond that required to achieve the desired results. (*FTC v. Royal Milling Co.*, supra; *Swanee Paper Co. v. FTC*, supra; *Korber Hats, Inc. v. FTC*, supra.)

There is no evidence of record that any participant in the Symbra'Ette marketing plan has, in fact, been injured or damaged. There is no evidence of record that the Symbra'Ette marketing program has, in fact, reached a saturation point at any time with respect to prospective participants. It is the reviewing court that must ultimately decide what constitutes a deceptive trade practice in violation of the Federal Trade Commission Act. Yet, there has never been a decision by any reviewing court that an open-ended, multi-level marketing program constitutes a deceptive trade practice in violation of the Federal Trade Commission Act.

The Commission suggests in the Brief For Respondent that an open-ended, multi-level merchandising program is inherently deceptive (Brief For Respondent, pages 59 and 62). The reasoning for this conclusion is set forth on page 38 of the Brief For Respondent wherein it is stated that the petitioner's plan was found by the Commission to have a tendency, capacity and potential to mislead by virtue of the saturation theory and *thus* to be inherently deceptive. For reasons previously advanced, there is no substantial evidence of probative value of record to establish that the Symbra'Ette marketing program in fact has the tendency, capacity and potential to mislead or to deceive because of any saturation theory. Should the Court find that there is no substantial evidence of record to support a finding that the Symbra'Ette marketing plan has the tendency, capacity and potential to mislead or to deceive by virtue of any saturation theory then it must follow that Paragraphs 1 and 2 of the Order bear no relation in scope to the facts of record. (*Swanee Paper Co. v. FTC* (2nd Cir. 1961) 291 F.2d 833.)

In dealing with deceptive advertisements, the Commission asserts that it may draw its own inferences from the advertisement and need not depend on testimony or exhibits introduced into the record, and still further asserts that actual deception or actual injury need not be shown. (Brief For Respondents, page 41.)[1] For drawing these various assertions, the Commission has relied primarily on the cases, *Carter Products, Inc. v. FTC* (5th Cir. 1963) 323 F.2d 523; *Zenith Radio Corp. v. FTC* (7th Cir. 1944) 143 F.2d 29; *Charles of the Ritz Distributors Corp. v. FTC* (2nd Cir. 1944) 143 F.2d 676.

In arguendo, assuming the Commission's contentions are well-founded, still these cases are readily distinguishable from the present action. In the cited cases, the Courts were considering the contents of advertising literature and the question of deleting or prohibiting certain statements in advertising literature. In the present action, in view of Paragraphs 1 and 2 of the Order, we are dealing with the survival of a company and its marketing program. If the present Order were limited to prohibitions of alleged misrepresentations in advertisements, perhaps the foregoing assertion of legal tenets would be palatable. But where we are dealing with consequences of by far greater gravity, as we are in the present action because of Paragraphs 1 and 2 of the Order, the reviewing court should require a more exacting and higher degree of standards from the Commission. (*Korber Hats, Inc. v. FTC,* supra.)

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[1]One may seriously question in view of the assertions as to the prerogatives remaining in the reviewing courts and what is left to the doctrine that findings of the Commission must be based on substantial evidence.

C. THE FEDERAL TRADE COMMISSION DOES NOT HAVE THE UNBRIDLED POWER TO INSTITUTE PROCEEDINGS WHICH WILL ARBITRARILY DESTROY ONE OF MANY ALLEGED LAW VIOLATORS IN AN INDUSTRY.

It is the contention of the Petitioners that the Federal Trade Commission does not have the unbridled power to destroy one of many alleged law violators in an industry. The Constitutional mandate of equal protection of the law under the Fifth Amendment is applicable to the conduct of the Federal Trade Commission. Industry-wide enforcement of the law is a constitutional imperative as a matter of fairness and equality before the law. When an administrative agency can arbitrarily and capriciously single out the Petitioner corporation for discriminatory treatment to the extent that it will be forced out of business, while permitting its direct competitors to continue to operate under the same and similar programs with impunity, the Commission, indeed, has violated the constitutional safeguards imposed by law.

The Commission, on the other hand, takes the following position (Brief For Respondent, page 45):

> It is sufficient that substantial evidence support the Commission's finding that petitioners' marketing plan violates Section 5 of the Federal Trade Commission Act and such a finding is in accordance with the law. . . .
>
> Further, policy judgments concerning the allocation of its resources and the effect thereof upon competition are matters within the discretion of the Commission. . . .

A similar contention was made by the Commission in the case *Marco Sales Co. v. FTC,* 453 F.2d 1 (2d Cir.

1971). This Court stated in the *Marco* case, supra, we cannot agree with the contention that the Federal Trade Commission has the sole discretion to determine how best to enforce its organic statute.

While the Court in the *Marco* case acknowledged that the Commission cannot be expected to bring simultaneously proceedings against all of those engaged in identical practices, the question of simultaneity is not a justification in the present action. The complaint against the Petitioners was filed on November 24, 1971. As of the present time, no action has been taken by the Commission against any of the direct competitors of Symbra'Ette. It is not a question of whether action must be taken simultaneously against all alleged violators, but rather whether Symbra-'Ette must be the scapegoat for an entire industry and suffer the consequences of possible annihilation as a company.

In the *Marco* case, the Court stated:

> There is ample authority to support the petitioners' position as the Supreme Court pointed out in FTC v. Universal Rundle, supra, 387 U.S. at 251, [o]n the other hand, as the Moog Industries case also indicates, the Federal Trade Commission does not have the unbridled power to institute proceedings which will arbitrarily destroy one of many law violators in an industry.

The Decision of the Commission on pages 16 and 17 acknowledges that the restrictions imposed by Provisions 1 and 2 of the Order will result in Symbra'Ette being less competitive than its direct competitors. Common sense will dictate that Symbra'Ette will not keep its distribu-

tors when direct competitors can offer economic benefits to the distributors, which economic benefits cannot be offered to the distributors by Symbra'Ette under Provisions 1 and 2 of the Order. The net results must be to make Symbra'Ette less competitive than its direct competitors and, of course, ultimately destroy Symbra'Ette. (See discussion on pages 36 and 37 of Petitioners' Brief.)

The Commission has relied upon the case, *Moog Industries v. FTC,* 355 U.S. 411 (1958), to support its contention. A careful perusal of the *Moog Industries* case, supra, admonishes the Commission that it cannot exercise a patent abuse of discretion and that a reviewing court can hold the enforcement of an Order in abeyance until the Petitioners' competitors are proceeded against when the Commission does abuse its discretion. In the same light, the Supreme Court in *FTC v. Universal-Rundle Corporation* (1967) 387 U.S. 245 again reiterated that it is proper for a reviewing court to determine whether the Commission's evaluation of the merit of a petition for a stay of an order was patently arbitrary and capricious. It is urged that the reviewing court has the authority to review the conduct of the Commission and the matter of the Commission's conduct is not solely within its own judgment and discretion. While the Supreme Court affirmed the judgment for the Commission in *FTC v. Universal-Rundle Corporation,* supra, on the ground the petition lacked sufficient evidence and the issue was not presented in a timely manner, the Supreme Court clearly held:

> On the other hand as the Moog Industries case also indicates, the Federal Trade Commission does not have the unbridled power to institute proceedings

which will arbitrarily destroy one of many law violators in an industry.

To justify its patently arbitrary and capricious conduct, the Commission urges that it has undertaken proceedings against four other companies employing multi-level marketing plans. These companies do not compete with Symbra'Ette. Symbra'Ette is concerned with companies selling brassieres, girdles and the like under a marketing program in substance the same as the marketing program of Symbra'Ette as shown in Exhibits RX-138, RX-140, RX-141, RX-142, RX-144, RX-145, and RX-201. Correction is made in that RX-139, RX-143, and RX-202 are not direct competitors.

The Commission urges upon this Court that the purpose of its orders are not to place those employing deceptive practices in pari delicto with one another or to permit the misconduct of others to constitute an excuse for dragging the standards down. It is submitted that the Petitioners are not seeking to justify misconduct on the part of anyone, if such misconduct in fact exists, but, rather, Petitioners are seeking to be treated fairly and equally and only be subjected to the same prohibitions to which its direct competitors are being subjected.

D. THE SYMBRA'ETTE MARKETING PLAN IS A VIABLE, SUCCESSFUL PROGRAM WITH ECONOMIC JUSTIFICATION.

Dr. Kirk Wassenaar, Associate Professor of Marketing at the California State University at San Jose, expressed the opinion that the Symbra'Ette program offered a

unique opportunity to many members of our society who would like to engage in a small business. These persons would not have this opportunity were it not for the Symbra'Ette program and similar programs because such persons do not have sufficient resources or experience (Tr. page 238, lines 1-8; Tr. page 244, line 16 to page 245, line 11). Dr. Wassenaar further testified that the Symbra'Ette program is more aggressive and is more result-performance oriented than traditional marketing plans. It is a less expensive way of achieving faster distribution of the products. A company, through such a marketing program, can be established faster, for less money and with less manpower (Tr. page 260, line 3 to page 261, line 4; Tr. page 288, line 22 to page 290, line 11).

The Commission's arguments as to the business conducted by Symbra'Ette leave the Petitioners in somewhat of a quandary. On page 38 of the Brief For Respondents, the Commission states, "No scheme of investment which must ultimately and inevitably result in failure can be called a legitimate business enterprise". Yet, Symbra-'Ette has been in business since the year 1963 and is still a viable company. The Commission continues in the Brief For Respondents on page 39 that the reliance by Petitioners upon evidence in the record suggesting that certain Symbra'Ette distributors enjoyed profitable operations and were not deceived is misplaced. Actual deception of the public, urges the Commission, need not be shown in Federal Trade Commission proceedings. Such testimony is in fact not needed, contends the Commission, to support an inference of deceptiveness by the Commission. Are we to assume from these arguments that the Com-

mission can prejudge the element of deceptiveness and determine the presence of a deceptive business practice without giving any weight to the evidence of record and draw any inference it deems appropriate from an illusory hypothesis without giving any credence or weight to the facts of record as they actually exist?

The Symbra'Ette marketing plan is a legitimate business program in which the primary emphasis is placed on the sale of Symbra'Ette products to the ultimate consumer over the recruiting of Symbra'Ette distributors. (Tr. page 147, lines 8-13; Tr. page 135, line 25 to page 136, line 17; Tr. page 140, line 10 to page 141, line 8; Tr. page 141, line 25 to page 145, line 14; Tr. page 162, lines 13-20; Tr. page 171, lines 11-23; Tr. page 173, line 8 to page 175, line 6; Tr. page 177, line 24 to page 179, line 5; Tr. page 219, lines 6-21; Tr. page 223, lines 8-21; Tr. page 262, line 7 to page 263, line 22; RX-157 through RX-196.) The Symbra'Ette marketing program is not a chain letter. Symbra'Ette has bona fide products, which, in fact, are sold to ultimate consumers, and the sale to the ultimate consumers is dominant in the Symbra'Ette marketing program. Symbra'Ette sells a high quality product at a fair and competitive price (Stipulation of Facts dated March 16, 1973, Paragraph 1). Exhibits RX-157 through RX-196 are letters received from consumers of Symbra'Ette products during the year 1973. The contents of these letters support the contention that Symbra'Ette products are of good quality and are reasonably priced. Consumers do purchase Symbra'Ette products and there are substantial repeat sales of the Symbra'Ette products by consumers. Therefore, the primary

emphasis of the Symbra'Ette marketing program must be placed on the sale of Symbra'Ette merchandise to consumers and not on the recruiting of distributors.

The Commission on page 32 of the Brief For Respondent argues that the testimony of Mr. Dale Meredith, the only witness for the Commission, focused on the importance of recruiting in the growth of Symbra'Ette distributors. Yet, Mr. Meredith's wife, according to his testimony, sold *during the first year* of the distributorship at least three or four thousand dollars worth of Symbra'Ette merchandise to ultimate consumers, while Meredith's initial order as a Symbra'Ette distributor was for $700 worth of merchandise (Tr. page 73, lines 1-14; Tr. page 76, lines 19-22).[2] It is understandable that Mr. Meredith was of such a frame of mind because he did the recruiting while his wife made the sales to the ultimate consumers (Tr. page 71, line 25 to page 72, line 10; Tr. page 73, lines 1-14). Further, the testimony on Mr. Meredith's background and history makes it readily apparent why he considered recruiting to be where the emphasis is placed (Tr. page 81, line 11 to page 85, line 12; Tr. page 88, line 5 to page 90, line 22; Tr. page 91, line 25 to page 95, line 21), while the evidence shows that a vast majority of the Symbra'Ette distributors consider the emphasis to be placed on the sale of products to the ultimate consumer. (Tr. page 147, lines 8-13; Tr. page 135, line 25 to page 136, line 17; Tr. page 140, line 10 to page 141, line 8; Tr. page 141, line 25 to page 145, line 14; Tr. page 162, lines 13-20; Tr. page 171, lines 11-23; Tr.

[2]Meredith's actual cost was approximately $450.

page 173, line 8 to page 175, line 6; Tr. page 177, line 24 to page 179, line 5; Tr. page 219, lines 6-21; Tr. page 223, lines 8-21; Tr. page 262, line 7 to page 263, line 22; RX-157 through RX-196.)

Mr. Meredith's background included dealing in recreational land sales, working at Justice Furniture Store for five months as a salesman, selling Electrolux sweepers house-to-house for two months, and as a Bible salesman selling house-to-house (Tr. page 91, line 25 to page 96, line 1).

Mr. Meredith testified that he left the Symbra'Ette program about January, 1971 (Tr. page 46, line 25 to page 47, line 1). Mr. Meredith formed a company known as Bellavonne, Inc. and mailed to potential participants a marketing program which was declared unethical and illegal and was not approved by the state. Mr. Meredith mailed price lists to prospective participants with little more than an inventory composed of sample products (Tr. page 81, line 11 to page 85, line 11; Exhibits RX-153 and RX-154). Mr. Meredith admitted he sent to Symbra'Ette fourteen checks returned for insufficient funds, for which checks he had received Symbra'Ette merchandise (Tr. page 89, line 15 to page 90, line 4; RX-156).

Respondent has argued in its Brief For Respondent on pages 51-58 matters on which the Petitioners do not seek judicial review. Petitioners were inclined, for reasons of expediency and for a desire not to unduly burden this Court, to yield to the Commission on those matters that can be changed with facility, and to appeal on those matters that will determine the ability of Symbra'Ette to survive at the market place. Notwithstanding, it is urged

that on such matters from which an appeal is not taken, the propriety thereof may very well be challenged.

For example, the Respondent on page 51 of the Brief For Respondent suggests the Petitioner corporation engaged in vertical price fixing by virtue of a single sentence grasped from an obsolete sales manual. There is no evidence of record that the conduct of Symbra'Ette resulted in any price fixing. A restraint constitutes price fixing only if the actual or probable effect thereof would result in the actual fixing of prices. There is no substantial evidence of record to support such a finding in this action. (*Board of Trade v. United States* (1918) 246 U.S. 321.)

Respondent's comments on page 51 of its Brief For Respondent as to overrides, bonuses, discounts and rebates constituting price fixing is inappropriate because it appears that the Commission in its Opinion did not so find. Arguments of counsel unsupported by a finding by the Commission have no standing on appeal. (*FTC v. Sperry Hutchinson Co.*, 405 U.S. 233 (1972).) For a fact, the Commission concedes this point on page 15 of its Brief For Respondent by stating, ". . . the Commission decided to retain in essence that part of the Law Judge's order concerning price fixing, for the purpose of prohibiting any recurrence in the future of illegal practices shown to have existed in the past", and on page 18 by stating, "The Commission also weighed the fact that the petitioners' price fixing practices had been abandoned". There is no prohibition in the Order against bonuses, rebates, overrides, discounts or the like. Moreover, it has been held that in the absence of proof that a rebate plan has a tendency to restrict the dealers' pricing independence,

or has some pricing effect, it amounts to nothing more than a promotional device, which cannot be labeled illegal per se. (*Checker Motor Corp. v. Chrysler Corp.* (1968) 283 F. Supp. 876.)

Similar comments may be made with respect to Respondent's arguments on Symbra'Ette restricting its distributors as to classes of customers (Brief For Respondent, pages 56 and 57). After the case *United States v. Arnold Schwinn & Co.* (1967) 388 U.S. 365, the Third Circuit in 1969 considered the matter of resale restrictions on professional beauty products in the case *Tripoli Co. v. Wella Corp.* (3rd Cir. 1970) 425 F.2d 932. In the *Tripoli* case, supra, the Court held certain restraints on the distribution of beauty and barber supplies intended for professional use to be reasonable and, hence, lawful. The Court in the *Tripoli* case applied the test that the restraint in the market setting was not only reasonable, but appropriate, in view of the nature of the products.

The evidence in the present action shows that service to the ultimate consumer is a vital factor in the success of the Symbra'Ette marketing program. Along with the service, proper custom fitting is an essential factor in the sale of Symbra'Ette products. Garment care must be explained to ultimate consumers. The personal touch and knowing a distributor is always available is part of the service to the ultimate consumer that spells out success in the Symbra'Ette marketing program. (Tr. page 135, lines 2-6; Tr. page 142, lines 2-6; Tr. page 143, line 9 to page 144, line 5; Tr. page 146, line 3 to page 147, line 7; Tr. page 240, line 11 to page 243, line 13; RX-157 through RX-[illegible], CX-74z16; CX-74z30; RX-1 pages 1, 3, 9, and S-6.)

E. THE PRESENT PROCEEDING IS NOT IN THE PUBLIC INTEREST AS REQUIRED UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT.

In its Decision on page 25, the Commission held that the present proceeding is in the public interest because the evidence reveals that Symbra'Ette practices have the potential and capacity to deceive by virtue of a saturation theory, and thereby they possess the capacity and potential to cause the loss of not inconsiderable sums of money by individuals who may rely on them to their detriment. It is submitted that there is no substantial evidence of record of probative value upon which such a finding could be made. There is no substantial evidence of record of probative value to show the potential and capacity to deceive or to show actual damage or injury.

The Commission made the same argument in the 7th Cir. case, *S. Buchsbaum & Co. v. FTC* (1947) 160 F.2d 121, as it does in this action and the Court set aside the Order of the Commission on deceptive practices and stated:

> We find in this record no evidence of injury to any dissatisfied customer, indeed, there are no dissatisfied customers as far as this record discloses. . . . The Commission contends that actual deception of purchasers need not be shown in its proceedings, and representations which have a capacity to deceive may be proscribed. This is quite true. . . . However, even though there be no proof of actual deception required, there must be a showing that the acts and practices sought to be proscribed *are detrimental to the public interest* in order to satisfy the statutory requirements that the proceedings be in the public interest (15 U.S.C.A. §4516) . . . . (Italics added for emphasis.)

It is submitted that the Commission has not shown by substantial evidence that the Symbra'Ette program has the capacity, tendency and potential to mislead and to deceive for reasons heretofore advanced and has not shown by substantial evidence that the Symbra'Ette marketing program is detrimental to the public interest.

Additionally, the cases cited by the Commission (*Speigel, Inc. v. FTC* (7th Cir. 1974) 494 F.2d 59 and *Montgomery Ward & Co. v. FTC* (7th Cir. 1967) 379 F.2d 666) are readily distinguishable from the *Buchsbaum* case, supra, and the present action. In the *Speigel* case, supra, and in the *Montgomery Ward* case, supra, the Court noted conduct detrimental to the public interest. No such finding was made in the *Buchsbaum* case. In the present action, there is no substantial evidence of probative value upon which such a finding could be made.

F. AMICUS CURIAE BRIEF OF DIRECT SELLING ASSOCIATION

The Amicus Curiae Brief of the Direct Selling Association leaves much to be desired. It is neither illuminating as to factual background material, nor does it shed any light as a guide to legal principles for direct selling organizations. Suffice it to say that the Petitioners do not share the few factual contentions that were made.

After the complaint herein was filed, one became a Symbra'Ette distributor by making a purchase of Symbra'Ette products. The initial order was a sample kit sold for $89.95, which was refundable in full within 90 days at the sole election of the purchaser (Paragraph 7 of the Stipulation of Facts, dated March 16, 1973, and

RX-3). This was later changed to $159.40 and refundable in full in 30 days.

If the Court follows the suggestion of the Direct Selling Association that the opinion of the Commission in the present action relates only to the facts concerning one particular sales plan which involved an initial, nonrefundable investment in inventory and alleged misrepresentations recruitment and earnings, then from a sense of fairness and treating all persons alike, the present order should not be enforceable against Symbra'Ette, when Symbra'Ette offers an initial refundable investment in inventory (as it presently does) and eliminates any of the alleged misrepresentations concerning recruiting and earnings in its advertisements.

CONCLUSION

The Federal Trade Commission, in its effort to establish administrative precedents on a case-by-case basis in the area of open-ended, multi-level marketing programs, has disregarded the proof and evidence of record and has relied, in substance, totally on "the expertise of the Commission". (Tr. page 24, lines 3-11.) This practice, if permitted, would lend itself to abusive administrative practice for the following reasons:

1. It imputes the wrongful conduct of other selling organizations to the Petitioner corporation. (Tr. page 24, line 19 to page 25, line 6);

2. It imputes the abuses of other selling programs to the marketing program in issue;

3. It causes the prejudging of the marketing program in issue without weighing the merits thereof and without considering all the facts and circumstances surrounding the same. (*Korber Hats, Inc. v. FTC,* supra.)

Petitioners question the soundness of holding a merchandising program as being "*inherently* deceptive" as a matter of law and then to imply therefrom detriment, harm and injury. (*S. Buchsbaum & Co. v. FTC,* supra.) This practice, if continued, would lend itself to abuse of power on the part of an administrative agency. It enables an administrative agency to resort to rhetoric instead of evidence and permits decision to be based on arbitrary and capricious conclusions rather than the actual facts. Ultimately, it could produce a travesty of justice, because it lends itself to baseless findings and unwarranted orders. If all the critical elements of an alleged violation are either inherent or to be implied, then the need for evidence of probative value becomes a mere sham and a mockery. Can an administrative agency be so endowed that it cannot commit any wrong or abusive act, and, hence, the need for legal principles for passing judgment are no longer required?

Vitally missing from this proceeding is substantial evidence of abuse, harm and injury. There has been no evidence of "inventory loading". There has been no evidence of "head hunting". The only suggested abuse (which has not been supported by substantial evidence) is that the more recent recruits will find a market more competitive than did the older participants. If, in fact, this condition does exist, it does not constitute abusive conduct. The Federal Trade Commission Act does not serve to assure

or guarantee success for all business ventures. It is a fact of life that there is competition in the market place and that more recent participants will find conditions more competitive than will established participants. This is so even though the established and the new participants pay the same price to purchase commodities and expend the same time and effort to obtain business.

If there be any questionable conduct on the part of Symbra'Ette, it must be in the alleged misrepresentations in its advertising. The ends of justice will be met and any misconduct will be obviated by merely prohibiting misrepresentations in the advertising. The Order need not and should not go any further. There is totally lacking in the present proceeding any justification going beyond the taking of corrective measures with respect to advertisements. Paragraphs 1 and 2 constitute an overkill and should not be permitted to stand. (*FTC v. Royal Milling Co.*, supra; *Swanee Paper Co. v. FTC*, supra; *Korber Hats, Inc. v. FTC*, supra.)

Dated, San Jose, California,
April 3, 1975.

Respectfully submitted,

Jack M. Wiseman

Clifton H. Stanage

Attorneys for Petitioners.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of San Francisco; I am over the age of eighteen years and not a party to the within action; my business address is: 562 Mission Street, San Francisco, California.

On April 7, 1975, I served the within

Reply Brief for Petitioners, "Ger-Ro-Mar, Inc. vs. Federal Trade Commission", in the United States Court of Appeals for the Second Circuit, No. 74-2343;

on the attorneys in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at San Francisco, California, addressed as follows:

Mr. Calvin J. Collier, General Counsel
Mr. Gerald Harwood, Asst. General Counsel
Mr. W. Baldwin Ogden, Attorney
Federal Trade Commission
6th Street and Pennsylvania Avenue N.W.
Washington, D.C. 20580

Mr. Gerald E. Gilbert
Mr. Philip C. Larson
Hogan & Hogan
815 Connecticut Avenue N.W.
Washington, D.C. 20006 (2 copies)

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on April 7, 1975, at San Francisco, California.

John F. Broderick